Protests

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Agenda

- Applicable Guidance
- Protest
- Interested Party
- General Guidance
- ***Agency Protests***
- GAO Protests
- Scenarios

Applicable Regulations

- FAR Subpart 33.1 -- Protests
- No DFARS Supplement
- AFFARS 5333.1 – Protests
  - 5333.103-90 Protests to the Agency
  - 5333.104-90 Protests to the GAO
    - AFFARS MP5333.104-90
- AFARS Subpart 5133.1 -- Protests

Definitions

- "Protest" means a ***written*** objection by an interested party to any of the following:
  - (1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
  - (2) The cancellation of the solicitation or other request.
  - (3) An award or proposed award of the contract.
  - (4) A termination or cancellation of an award of the contract, ***if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract***.

Definitions

- “Interested party for the purpose of filing a protest” means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.
- Day generally means calendar day unless otherwise specified
- Filed means complete receipt of any document by close of business

General

- Consider all protests and ***seek legal advice***, whether protests are submitted before or after award and whether filed directly with the agency or the General Accounting Office (GAO).
- Protests of small business status, see 19.302
- Protests of disadvantaged business status see 19.305
- Protests of service-disabled veteran-owned small business status, see 19.307

General

33.102 -- General

- (e) An interested party wishing to protest is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR Part 21).
- (f) No person may file a protest at GAO for a procurement integrity violation ***unless that person reported to the contracting officer the information constituting evidence of the violation within 14 days after the person first discovered the possible violation*** (41 U.S.C. 423(g)).

Protests to the Agency

33.103 -- Protests to the Agency

- Parties shall use best efforts to resolve concerns raised by an interested party at the CO level through open and frank discussions prior to submission of protest.
- Agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests.
- Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

Protests to the Agency

33.103 -- Protests to the Agency

- (1) Protests shall be concise and logically presented to facilitate review by the agency. Failure to ***substantially*** comply with any of the requirements of subparagraph (d)(2) of this section ***may*** be grounds for dismissal of the protest.
- (2) Protests shall include the following information:
  - (i) Name, address, and fax and telephone numbers of the protester.
  - (ii) Solicitation or contract number.
  - (iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.

Protests to the Agency

33.103 -- Protests to the Agency

- (iv) Copies of relevant documents.
- (v) Request for a ruling by the agency.
- (vi) Statement as to the form of relief requested.
- (vii) All information establishing that the protester is an interested party for the purpose of filing a protest.
- (viii) All information establishing the timeliness of the protest.

- (3) All protests filed directly with the agency will be addressed to the CO or other official designated to receive protests.

Protests to the Agency

5333.103-90 Protests to the Agency

- (b) An ***agency protest is usually filed with the contracting officer***. Offerors are encouraged to file at the lowest level to resolve the issues concerned. In all cases, a copy of ***an agency protest must be provided to the contracting officer regardless of the level at which the protest is filed***. When an agency protest is denied, an offeror may request an independent review at a level above the contracting officer.

Protests to the Agency

33.103 -- Protests to the Agency

- Interested parties may request an independent review of their protest at a level above CO
- Solicitations should advise potential bidders and offerors that this review is available
- Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the CO of a protest or is available as an appeal of a CO decision on a protest
- Agencies shall designate the official(s) who are to conduct this independent review

Protests to the Agency

33.103 -- Protests to the Agency

- When practicable, officials designated to conduct the independent review ***should not have had previous personal involvement in the procurement***.
- If there is an agency appellate review of the contracting officer's decision on the protest, it ***will not extend GAO's timeliness requirements***. Therefore, ***any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action*** (4 CFR 21.2(a)(3)).

Protests to the Agency

33.103 -- Protests to the Agency

- Protests based on alleged apparent improprieties in a solicitation ***shall be filed before bid opening or the closing date for receipt of proposals***.
- In all other cases, ***protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier***. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.

Protests to the Agency

33.103 -- Protests to the Agency

- Receipt of a protest before award
  - ***Contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government***.
  - Such justification or determination shall be ***approved at a level above the contracting officer***, or by another official pursuant to agency procedures.

Protests to the Agency

33.103 -- Protests to the Agency

- If award withheld pending agency resolution of the protest
  - CO informs offerors whose offers might become eligible for award of the contract
  - If appropriate, offerors should be requested, before expiration of the time for acceptance offers, to extend the time for acceptance to avoid need for re-solicitation
  - In the event of failure to obtain extension of offers, consideration proceeding with award

Protests to the Agency

33.103 -- Protests to the Agency

- (3) Protest received within 10 days after contract award or 5 days after debriefing date offered to protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later
  - CO shall immediately ***suspend performance***, pending resolution of the protest within the agency, including any review by an independent higher level official
  - Continue performance if justified, in writing, for urgent and compelling reasons or in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

Protests to the Agency

33.103 -- Protests to the Agency

- Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.
- Agencies shall ***make their best efforts to resolve agency protests within 35 days after the protest is filed***. To the extent permitted by law and regulation, the parties may exchange relevant information.

Protests to the Agency

33.103 -- Protests to the Agency

- Agency protest decisions (to sustain/deny offeror's protest) shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

5333.103-90 Protests to the Agency

- The decision to deny a protest shall be made at a level no lower than that at which the protest was filed. Protests may be sustained at any level in the review process, with the concurrence of the cognizant legal office.

Protests to the Agency

5333.103-90 Protests to the Agency

- The contracting officer shall prepare the protest file following an agency protest ***(including a protest of a non-appropriated funds procurement)*** regardless of the level at which the protest is filed. The contracting officer shall request guidance from SAF/AQCX for any protest likely to generate significant Congressional interest.

Summary

- FAR 33.1 as Supplemented
- Protests must be in writing by interested parties
- Protests should be resolved at lowest level possible
- Protests must be submitted before/after award no later than 10 days after the basis of protest is known or should have been known
- Contract awards postponed/performance suspended pursuant to protests
- Award/continued performance prior to resolution must be justified in writing as urgent and compelling or in the best interest of the Government and approved at a level higher than the CO IAW agency procedures